

ONLINE COPYRIGHT INFRINGEMENT AND THE LIABILITY OF INTERNET SERVICE PROVIDERS

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Introduction

The arena of copyright and related rights has immensely expanded, with the technological advancement of the last few decades, resulting in innovations through forms of worldwide communication via satellite broadcast and compact discs. Dissemination of works via the internet is however the latest development which has raised new questions concerning copyright. With the growing popularity of the internet, incidents of online fraud, theft, piracy and infringement have grown correspondingly.¹

The internet, the phenomenon of the twentieth century, has been described as “*the world’s biggest copy machine.*”² The

traditional technologies of photocopying and taping allow mechanical copying, but in limited quantities, in a considerable time, and of a lower quality than the original. Furthermore, such copies are physically located in the same place as the person making the copy. In contrast, on the Internet, a person can make an unlimited number of copies of any copyrighted work, virtually instantaneously, without any degradation in quality. Moreover, these copies can be transmitted to any location around the world in a matter of minutes, resulting the disruption of traditional markets for the sale of copies of copyrightable work such as computer

¹ April M. Major, *Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the World Wide Web*, 24 RUTGERS **COMPUTER& TECH. L.J.** 75, 75 (1998).

² Maverick Kevin Kelly (*Wired* co-founder and Senior) at the inaugural NEXTWORK

technology conference;
<https://www.wired.com/2011/06/kevin-kellys-internet-words/>

programs, music, videos, games, art, books and movies.³

This transformation of technology through the internet which has created digital platforms inter-alia, resulted in the development of several areas of law, including the law on Copyright. From a legal perspective, the extension of intellectual property rights for works published or created in digital form has been central to these new developments. Unlike the traditional classification of copyright works such as literary work, artistic works, digitization has resulted in introducing many digital aspects to copyright works. This has also created legal issues since the copyright law had no experience of dealing with combination of work in its digital form. Hence, the new areas of copyright law are quite unique as it provides for the interpretation and identification of copyrightable work on digital space. Therefore, it is critical to fine-tune the existing legal system to respond to these new technological atmosphere in an

³ Intellectual Property Rights In Cyberspace By Akash Kamal Mishra; Cyberlekh Publication's; First Edition 2019

effective and appropriate way both at national and international levels, as the Internet is a borderless medium.⁴

Internet content; whose rights are to be protected? Why is it so difficult to identify the parties?

The foremost issue related to the intellectual property rights for an online content publisher is the ownership of the content as there are many intellectual property rights involved in online content. When it comes to video streaming it becomes further complicated. The underlying property of a feature film, TV series, short film, play, musical or an animation, can be a book, comic, game, screen play, or a script which involves copyrights. There are trademarks involved in such products including the film title, character name, logo, insignia, website, or domain name. Additionally, there can be design rights for the costumes, interiors

⁴ WIPO "Permanent committee on cooperation for development related to intellectual property", Third session Geneva, October 28 to November 1, 2002

and rights for music in terms of the musical recording, lyrics, music, or the soundtrack⁵ As such a question arises as to who owns all these rights and who will have the legitimate right to take any legal action against the infringement, as here may be one or two major players owning all these rights, or few parties involved in right holding jointly. In such situations, the legal framework needs to address the rights of all the parties and it should facilitate remedies for such parties.

Internet Content and the ways of infringements

The content of the Internet can be broadly classified into few main categories such as Movies, Video games, TV series, music, E-books, and software. Depending on the type of the content, there are several ways of infringements.

Streaming or accessing – Through this method the user can view, listen or play content directly through the internet

⁵ Cathy Jewell, *WIPO* “From Script to Screen: What Role for Intellectual Property?” https://www.wipo.int/pressroom/en/stories/ip_and_film.html

without downloading a copy. Watching television programs on Netflix or listening to music through services such as Spotify or Pandora will fall within this category.. Both legal and illegal ways of doing this are available on the internet and as a result obtaining unauthorized access through illegal methods has become increasingly popular. Large-scale copyright infringement on the Internet have been recorded by means of unauthorized streaming and or through peer -to-peer sites.⁶

Downloading – Through this method the user can transfer a copy of the file to the user’s device. Downloading a music track to the user computer through iTunes or Amazon or downloading a movie through torrent are examples of this.. Downloading rate of movies through pirate software is also on the rise.⁷

Sharing – This method allows the user to make the file publicly available, send or upload the file online for someone else to

⁶ A. Strowel (ed.), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Cheltenham, UK / Northampton, MA, Edward Elgar, 2009.

⁷ <https://parentinfo.org/article/what-is-and-isnt-legal-online>

download or stream access. For example, sharing files on your computer through an online service. Accordingly, the critical issue is whether such shared content is shared by its original author or a copyright holder or otherwise.

Liability of internet service providers

Although the internet as a new medium of communication has offered unparalleled new freedom, it is prone to vulnerabilities which expose it to exploitation. The Internet allows information to be sent anywhere at any time or to be downloaded, but not always with the rightful owner's permission.⁸

One major issue that has caused concern in this area is the position of those who provide the services and facilities which facilitate the copyright infringement on the internet.⁹ Internet Service Providers (hereinafter ISPs) are the entities that have the most control over the flow of

information, yet they disavow any affirmative responsibility to protect ownership rights.¹⁰ ISPs provide the hardware and infrastructure for the society to enable the communication including access to web through local servers, bulletin boards and web sites where others can post information, and also internet cafes which provide temporary access to the net¹¹. Different jurisdictions have taken different approaches with regard to the liability of the ISP on infringements. Accordingly, in many countries, ISP can be found liable for the traffic on the websites that they host.¹² Even though, the ISPs themselves are not undertaking any act that infringe copyright, the liability arises indirectly that they either contribute to, or encourage in some way, infringing activities, and therefore they are liable for

⁸Ibid 76.

⁹ WCT, Art 8 Note also the "Agreed Statement" annexed to the Treaty stating that the mere provision of facilities for the enabling or making a communication does not in itself amount to a communication within the meaning of the Treaty or the Berne Convention.

¹⁰ "Copyright Infringement on the Internet: Can the Wild, Wild West Be Tamed?" By David Allweiss, *Touro Law Review*, Volume 15 | Number 3 (1999)

¹¹ "Intellectual Property Law" Lionel Bently and Brad Sherman, 2nd Edition (2004) Oxford University Press, p 149

¹² Watt, Richard and Mueller-Langer, Frank, *Indirect Copyright Infringement Liability for an ISP: An Application of the Theory of the Economics of Contracts under Asymmetric Information* (December 31, 2018). *Review of Economic Research on Copyright Issues*, 2018, 15(2), 57-79. Available at SSRN: <https://ssrn.com/abstract=3311021>

any claim of indirect involvement by the affected copyright holders.¹³

Legal framework

With the advent of new technologies and novel forms of communication, the requirement of a dynamic legal framework has surfaced. Due to the high demand of new laws and rules, different jurisdictions enacted various legal instruments to cope with the new arrival of the technology and the services provided by the same.

The European Commission has decided to pre-empt the development of diverse national responses through a harmonizing directive, but has taken the view that ISP could incur liability on a number of bases such as defamation, copyright and obscenity.¹⁴ The British approach was revealed in 2002 by its Electronic Commerce (EC Directive) Regulations which introduced three general immunities

from liability namely mere conduits, caching and hosting.¹⁵

The new amendment to the Copyright Act 1968¹⁶ intended to extend Australia's site blocking regime to cover search engines such as Google while making a range of amendments to the prevailing site blocking regime. This provides that a person may be liable for authorizing an act that infringes copyright.¹⁷ The three main factors to be taken into account in determining whether a person has authorized an infringement; (i) the extent (if any) of the person's **power to prevent** the doing of the act concerned (ii) the nature of any **relationship** existing between the person and the person who did the act concerned (iii) whether the person took any **reasonable steps** to prevent or avoid the doing of the act, including whether the

¹³ Ibid

¹⁴ "Intellectual Property Law" Lionel Bently and Brad Sherman, 2nd Edition (2004) Oxford University Press, p.150

¹⁵ Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 in force on 21 Aug 2002

¹⁶ Copyright Amendment (Online Infringement) Act No. 157, 2018 Australia

¹⁷ S. 36 (1) and 101 (1) of the Copyright Act 1968 No 63 Australia

person complied with any relevant industry codes of practice.¹⁸

International approach

The modern world has developed quite a comprehensive legal framework as a protection mechanism in its attempts to harmonize the law governing the creative work.

Berne Convention for the Protection of Literary and Artistic Works (Bern Convention)

The Bern Convention deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, and painters with the means to control how their works are used, by whom, and on what terms. The works of authors in a particular country are protected in all the member countries of the Berne Convention for the Protection of Literary and Artistic Works.

¹⁸ibid S. 36 (1A) and 101 (1A)

WIPO administered treaties

WIPO is deeply involved in the ongoing international debate to shape new standards for copyright protection in cyberspace. As a result, the WIPO has introduced two treaties namely WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT) which are administered by the organization. The two treaties lay down international norms related to preventing unauthorized access to and use of creative work on the internet or other digital work. The Copyright Treaty provides the protection for authors of literary and artistic works such as writings, musical works audiovisual works, works of fine art and photographs whereas the Performances and Phonogram Treaty provides the protection for authors rights of performers and producers of phonograms. The WCT and WPPT each contain several provisions that impose obligations derived from, and similar to, those in the TRIPS Agreement. Accordingly, countries whose laws are already in compliance with TRIPS would

not need to make any amendments in order to satisfy these provisions of the two new treaties.¹⁹

WTO -TRIPS Agreement

The Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS) is also an international legal agreement between all the member countries of World Trade Organization (WTO) which has laid down minimum standards for the regulations on Copyrights, related rights and trademarks that are applicable to nationals of other WTO countries. However, the TRIPS provisions have already become somewhat outdated due to the rapid development of the Internet in the 1990s. Therefore, the WCT and WPPT try to bring up to date the TRIPS obligations, creating a contemporary and comprehensive legal framework for the digital age.²⁰

Judicial decisions

¹⁹ International Bureau of WIPO “The advantages of adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances And Phonograms Treaty (WPPT)”

²⁰ Ibid

The Pirate Bay

The Stockholm District Court delivered its verdict on the four-people charged with complicity in breach of the Copyright Act.²¹

The subject matter in this case was criminal liability for complicity (aiding and abetting) in breaches of the Copyright Act of the individuals involved in the operation of the file sharing service, The Pirate Bay. The file sharing service used BitTorrent technology to make it possible for other people to share computer files containing, for example, copyright-protected music and films. The Court of Justice of the European Union (‘CJEU’) developed further its construction of the right of communication to the public within Article 3(1) of Directive 2001/292 in this judgment and explained the conditions under what the operators of an unlicensed online file-sharing platform shall be liable for copyright infringement.²² The verdict of The Pirate Bay case can be considered as a

²¹ *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, EU:C:2017:456 (‘The Pirate Bay’, or ‘Pirate Bay’)

²² The CJEU Pirate Bay judgment and its impact on the liability of online platforms, by Eleonora Rosati, Associate Professor in Intellectual Property Law (University of Southampton)

meaningful victory in the war of combatting the digital piracy.²³

Roadshow v iiNet²⁴

This case is important in Australian copyright law because it tests copyright law changes required in the Australia–United States Free Trade Agreement and set a precedent for future law suits about the responsibility of Australian Internet service providers with regards to copyright infringement via their services. It dealt with the liability of an ISP, iiNet, for copyright infringements its customers had committed using peer-to-peer file-sharing technology to upload and download copyright films. The High Court found the ISP not liable, as it had not authorized the copyright infringement of its users. However, the judgment leaves open questions about the scope of authorization liability under the Copyright Act²⁵, and its

²³ Min Yan, (Queen Mary University of London) “The Law Surrounding the Facilitation of Online Copyright Infringement (2012) 34(2)” European Intellectual Property Review

²⁴ [2012] HCA 16

²⁵ The Copyright Act 1968 No 63 Australia

applicability to modern technological contexts.

NRL v Optus TV Now²⁶

This case established the fact that the Copyright Act²⁷ remains somewhat inflexible in addressing rapidly changing manner in which the users enjoy content, particularly through the internet and mobile devices. The court recognized the need of addressing the issues that have been created by the rapid developments in the light of copyright and internet. This case decision will also undoubtedly provide guidance to Australian Law Reform Commission’s review of the Australian copyright law.²⁸

Conclusion

In conclusion, this paper has observed that the rapid changes in the technology has created the need to change the laws related to all the aspects of usage of such

²⁶ [2012] FCAFC 59

²⁷ The Copyright Act 1968 No 63 Australia

²⁸ <http://www.alrc.gov.au/inquiries/copyright>

technology. However, it is not easy to frame or speculate all the legal issues that can arise in one or few legal instruments since the technology is evolving rapidly.

In the process of reducing copyright infringements in the cyber space, it is evident that everyone plays a major role. The right holders shall ensure that their content can be easily accessed for an affordable price. Internet Service Providers need to ensure that reasonable steps are taken so that their systems are not been used to infringe copyrights. The role of the consumers to do the right thing and access content only in a lawful manner.²⁹ In this context, the striking a balance between the rights of copyright holders and usage rights of the customers seems to be important. Therefore, a comprehensive legal framework is much needed to eliminate the uncertainty and to maintain a fair balance of disparate interests.

²⁹ Online Copyright Infringement – Discussion Paper by Australian Government, July 2014